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ABSTRACT

The right of publicity is based on an individual's right to be free from the appropriation of his or her name or likeness by another for the other's financial benefit. As the courts' conception of the right of publicity was exapnding, so was the development of newsworthiness as a defense for media defendants. In "Zacchini v. Scripps-Howard," a case dealing with a human cannonball's entire performance being shown on a television news show against his express wishes, the Supreme Court ruled that Zacchini's act was protected under a right of publicity. Critics of the decision predicted chilling effects on future news coverage. Since that decision, courts have faced right of publicity cases with several elements--descendibility (property rights that descend to heirs), literary considerations, unfair competition, commercial purposes, harm to reputation, and consent--closely intertwined. Because these cases involve a delicate balancing process beween the media's right to inform the public about newsworthy people and the celebrity's right to enjoy the fruits of his or her own labors, restriction on freedom of expression has occurred and may continue to do so. Applying guidelines based on copyright's fair-use doctrine may be the best way to deal with these issues. (JL)

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FIVE YEARS OF RIGHT OF PUBLICITY: THE AFTERMATH OF 'ZACCHINI v. SCRIPPS- HOWARD'

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FREEDOM OF INFORMATION CENTER REPORT NO. 473

This report was written by Karen List, an assistant professor in the School of Journalism at the University of Missouri-Columbia. **She would like to thank graduate student Melinda L. Matthews for her research assistance.**

Hugo Zacchini, "the human cannonball," wasn't thinking about legal history[1] as he slipped into the mouth of his cannon at Ohio's Geauga County Fair on that August day in 1972. He was thinking about his net 200 feet away.[2]

It took Zacchini fifteen seconds to land in that net and just that long for a cameraman from Cleveland television station **WEWS** to film Zacchini's act against his wishes and for **WEWS** viewers to watch the stunt later on the 11 o'clock news.

It then took Zacchini five years and three court battles before his claim of unlawful appropriation of his professional property reached the U.S. Supreme Court. The Court held that the First and Fourteenth Amendments do not immunize the media from a suit for compensation brought under a state-created right of publicity when they act without the consent of the claimant.[3]

This right of publicity — based on an individual's right to be free from the appropriation of his name of likeness by another for the other's financial benefit — represents the first effort by the Court to reconcile an individual's private right to profit from his personality with the need of the public to be informed about that personality.[4] As the right was recognized by a growing number of jurisdictions,[5] one scholar saw the trend as signaling a "dramatic reduction in press freedom."[6] Others have agreed with that assessment.[7]

This article reviews development of the right of publicity in the years since **Zacchini v. Scripps-Howard**. It looks first at development of the right prior to **Zacchini**, then at the case itself, and finally at recent cases centering on the right. Guidelines for deciding future right of publicity cases based on copyright's fair-use doctrine are suggested in the conclusion.

DEVELOPMENT OF THE RIGHT OF PUBLICITY

The right of publicity stems from the right of privacy first articulated by Samuel Warren and Louis Brandeis in an 1890 article. The article described privacy as the right to be let alone and distinguished that right from libel and slander on the basis of a spiritual-material dichotomy.[8] The late William Prosser, one of the leading experts on the right of privacy, discussed the right in terms of four separate invasions: intrusion into physical solitude; publication of private matters; false light; and appropriation of some element of the plaintiff's personality — one's name or likeness — for commercial use.[9] It is under the latter category of misappropriation that the right of publicity has developed. The misappropriation of a plaintiff's personality involves a critical distinction from the other three invasions of privacy: misappropriation can involve not only the right to be let alone but also the right to be paid for being bothered.[10] The latter often is the case when a celebrity's personality is appropriated.

The tort of appropriation first received nationwide attention in 1905 when the Georgia Supreme Court acknowledged a common law right of an individual to control commercial use of his picture.[11] The right subsequently was recognized by most states either at common law or by statute, the difference being that those states with statutes require appropriation for commercial purposes.[12]

Early court cases tended to mix the right to be let alone and the right to be compensated for pecuniary loss. Although financial loss was central to most suits, some were brought on the basis of injury to feeling rather than the pocketbook. Cary Grant, for example, was not interested in

Summary

Since the U.S. Supreme Court affirmed the right of publicity as a proprietary right in **Zacchini**, courts have struggled to balance that right against the media's right to inform people about newsworthy people. The author surveys court decisions in the area and suggests a resolution through use of copyright law's fair-use doctrine.

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being compensated for **Esquire's** use of his picture with a feature on new clothing styles; he simply found the magazine's placing his head on the latest fashions offensive.[13]

In addition to recognizing claims such as Grant's, courts also recognized a need to protect a celebrity's economic value in publicizing himself.[14] But they tended to become so entrenched in the Grant mold of "hurt feelings" as a basis for recovery that many celebrities were denied protection.[15] As long as courts tended to classify appropriation as usurpation of privacy instead of as a proprietary interest, celebrities generally lost cases because they were deemed public figures who had asked for press coverage and could not legally complain when it occurred.[16]

The phrase "right of publicity" was first coined in 1953 in a case that upheld the rights of a baseball player who assigned his right of publicity to a company manufacturing chewing gum cards.[17] The rationale underlying the decision was that a person who has invested years of practice, effort or competition in a public personality should have the exclusive private right to realize the monetary profits from its marketable status. The right was later extended to include not only a person's name and likeness but also one's reputation and accomplishments.[18]

In yet another significant extension of the right of publicity, New York and California courts distinguished it from privacy and held that since the right of publicity is a property right, it descended to the widows of Stan Laurel and Oliver Hardy[19] and to the heirs of Bela Lugosi (although the latter decision eventually was overturned because Lugosi had not himself exercised the right).[20] In addition to the expansion of the right of publicity, courts recognized other similar theories of recovery sought by plaintiffs, including unjust enrichment[21] and unfair competition.[22]

At the same time that the right of publicity was expanding, however, so was development of newsworthiness as a defense for media defendants. Immunity from prosecution for commercial exploitation based on a legitimate news interest was recognized in cases in which the First Amendment barred successful suits by Pat Paulsen, Frank Man and Elvis Presley.

First Amendment claims defeated Paulsen's suit against manufacturers of his campaign poster, which consisted of his picture and the caption: "FOR PRESIDENT."[23] A New York Superior Court said that despite the obviously commercial motive behind the posters, they constituted political commentary on his 1968 mock presidential campaign.

The question of where to draw the line between the right of the public to know and an act of appropriation came up again when Man's rendition of "mess call" on his flugelhorn before 400,000 spectators at the Woodstock music festival was filmed for a commercial motion picture.[24] Even though once again the appropriation was for commercial purposes, a U.S. District Court said that Man had voluntarily placed himself in the spotlight and that the movie was no more than a factual depiction of events of public interest and, therefore, newsworthy.

Two years later, when Elvis Presley sued a record company that had included an interview with him on a "talking magazine," the same New York Superior Court that heard Paulsen's case found that Presley was not entitled to relief because the record disseminated information of public interest.[25]

Added to these cases were two that upheld the use of photographs of Shirley Booth and Joe Namath by **Holiday** and **Sports Illustrated** respectively in advertisements for those magazines.[26] The New York Supreme Court in both instances said the magazines' use of the pictures in ads meant to illustrate the quality and content of the publications was protected because the pictures originally were published as news.

What one scholar has called a period represented by "extreme interpretations of press interest,"[27] however, soon was to be somewhat undercut by **Zacchini**. In that case, the defense of newsworthiness — claimed successfully in the cases cited previously — failed.

ZACCHINI v. SCRIPPS-HOWARD

Hugo Zacchini was preparing to perform his act as a human cannonball on August 30, 1972, at an Ohio county fair twenty miles from Cleveland. A cameraman from Cleveland's **WEWS-TV** asked for permission to film the show. Zacchini refused. The cameraman left and Zacchini performed the act, which he says was invented by his father and performed only by his familiy for the past 50 years.[28]

On the following day, the cameraman returned to the fenced area surrounded by grandstands in which Zacchini performed for fair crowds at no extra charge over gate admission. The act was filmed and shown as part of the station's 11 o'clock newscast that evening. The commentary that accompanied broadcast of the 15-second performance referred to "the great Zacchini" and concluded by saying the act "is a thriller. . . and you really need to see it in person. . . to appreciate it."[29]

In July of the following year, Zacchini filed a $25,000 suit for unlawful appropriation of his professional property. Defendant Scripps-Howard claimed First Amendment protection for the broadcast, and the Cuyahoga County trial court found in favor of the station.

Zacchini then appealed to the Ohio 8th District Court of Appeals, which reversed the lower court on the basis of conversion and common law copyright.[30] Such a performance, the Court said, is the product of the actor's talent and is his property. Therefore, the Court said, the performance involves a property right entitled to the same protection under common law as other property rights.[31] In response to the defendant's First Amendment contentions, the Court said the Amendment "provides no defense to the taking of private property against the owner's explicit denial of permission."[32]

On appeal, the Ohio Supreme Court refused to sever the rights of publicity and privacy, saying that Zacchini wanted to keep the benefits of his performance private.[33] The Court said a common law right of publicity existed, but that an "actual malice" standard — as applied in **Time, Inc. v. Hill**[34] to false light invasion of privacy — also would apply in cases such as Zacchini's:[35]

> No fixed standard which would bar the press from reporting or depicting either an entire occurrence or an entire discrete part of a public performance can be formulated which would not unduly restrict the 'breathing room' in reporting which freedom of the press requires. The proper standard must necessarily be whether the matters reported were of public interest.[36]

Just as the press was privileged to cover matters of legitimate public interest which might otherwise be considered private on the basis of **Time, Inc. v. Hill**, the press also was privileged, the Court said, to cover an individual publicly seeking to exploit his talents while keeping the benefits private. The act was broadcast as news, and the station's privilege would be lost only if its intent was not to report the performance but to appropriate it for private use or to injure the performer, the Court said.[37]

On June 28, 1977, the U.S. Supreme Court reversed the Ohio Supreme Court's decision. The high court said a performer's interest in his act is protected under a right of publicity that could be analogized to copyright and patent law.[38] Just as copyright protects expression, so does the right of publicity protect a performer's proprietary interest in — but not a discussion of — his work. Thus, while talking about the act is protected by the First Amendment, showing the performance as a whole is not. The Court said it could not state exactly where the line between what can and cannot be reported would be drawn in every case, but stressed "we are quite sure that the First and Fourteenth Amendments do not immunize the media when they broadcast a performer's entire act without his consent."[39] The protection, the Court said, provides an economic incentive for Zacchini to make the investment required to produce a performance of interest to the public and allows him to reap the value of his effort and to make a living.[40]

The Supreme Court specifically rejected the Ohio Supreme Court's categorization of the case as a privacy suit. Privacy actions protect reputation, not proprietary interests, the Court said. Thus, the **Hill** malice test was inapplicable.

The two torts also differ, the Court noted, in the degree to which they intrude on dissemination of information to the public. In false light privacy actions such as **Hill**, the defendant wants to minimize publicity, while in right of publicity cases such as **Zacchini**, the question merely is one of who gets to do the publicizing.[41]

The Court concluded that Ohio may, as a matter of its own law, privilege the press, but the state was not constitutionally required to do so.[42] In other words, a state may decide that an individual's right of publicity sometimes outweighs freedom of the press, and if that individual can prove injury on the basis of publication, the state may award damages.[43]

In dissent, Justice Lewis Powell, joined by two other justices, said the media's First Amendment privilege should not be based on the appropriation of an entire act, but rather on the use the station makes of the act. If the act was used as part of a newscast it would be protected, but if private or commercial exploitation was involved, it would lose its protection.[44]

AFTERMATH OF ZACCHINI: THE DEVELOPMENT OF THE RIGHT OF PUBLICITY IN RECENT CASES

Dire predictions of chilling effects on the media stemming from the decision in **Zacchini** began immediately with the case's dissenting opinion. The Court's majority was criticized for failing to be "appropriately sensitive to the First Amendment values at stake."[45]

> Hereafter, whenever a television news editor is unsure whether certain film footage received from a camera crew might be held to portray an 'entire act,' he may decline coverage — even if clearly newsworthy. . . or confine the broadcast to watered-down verbal reporting, perhaps with an occasional still picture. The public is then the loser. This is hardly the kind of news reportage that the First Amendment is meant to foster.[46]

Among specific questions raised by scholars critical of the decision were:

- What constitutes an entire act?
- Could the problem be circumvented by rolling cameras just after an act started?
- How would acts within acts be treated?
- How would radio and the print media be affected since they cannot indicate mannerisms and delivery as can television?
- What constitutes implied consent?
- How would damages be calculated?[47]

Some of these questions have amounted to the proverbial tempest in a teapot since no performer since Zacchini has filed a suit based on appropriation of an entire act. Furthermore, any chilling effect **Zacchini** might have on day-to-day editorial decision-making would be difficult to substantiate. On the other hand, court records show that plaintiffs have continued to come to court with appropriation complaints based on the right of publicity.[48]

Recent cases have further shaped the right in general and the defense of newsworthiness in particular. These cases indicate judicial disagreement about the assignability and descendibility of the right of publicity. In addition, while First Amendment claims of movies, books and magazines sometimes have been favored over plaintiffs' rights of publicity, other cases have seen media defendants' claims of newsworthiness fail where a commercial purpose was found, reputations were harmed or consent was absent.

The most significant recent cases in the area of assignability and descendibility involve the estate of Elvis Presley. During his lifetime, Presley entered into an exclusive contract with Boxcar Enterprises for the use of his name and likeness for commercial purposes. Since the singer's death, Boxcar's licensee, Factors, Etc., has been involved in several suits against other companies charged with exploiting Presley's commercial value. Three cases in 1977 and 1978[49] determined that Presley's right of publicity — clearly exercised by him during his lifetime and financially beneficial to him — constituted a recognizable, assignable property right that survived his death. A U.S. District Court in one of the Presley cases said:

> There is no reason why the valuable right of publicity — clearly exercised by and financially benefiting Elvis Presley in life — should not descend at death like any other intangible property right.[50]

While these cases strengthened the existence, assignability and descendibility of the right, its descendibility has been rejected by higher courts in both the 6th and 2nd circuits. First, in the 1980 **Memphis Development Foundation v. Factors, Etc.** decision, the U.S. Court of Appeals for the 6th Cir-

cuit determined that the entertainer's right of publicity — even if exercised and exploited in his lifetime — did not survive his death. The Court wrote:

> This appeal raises the interesting question: Who is the heir of fame? The famous have an exclusive legal right during life to control and profit from the commercial use of their name and personality. We are called upon in this case to determine whether, under Tennessee law, the exclusive right to publicity survives a celebrity's death. We hold that the right is not inheritable. After death the opportunity for gain shifts to the public domain where it is equally open to all.[51]

The identification and use of the right of publicity during one's life, therefore, was not considered sufficient to convert it into an inheritable property right after death. It was fairer and more efficient, the Court said, for the name, memory and image of the famous to be open to use by all, rather than to be monopolized by a few. Such material "should be regarded as a common asset to be shared, an economic opportunity in the free market system."[52]

The Court rationalized its decision by suggesting "a whole set of practical problems of judicial line-drawing would arise should the courts recognize such an inheritable right." The questions raised would include: How long should such a property interest last? Would it be taxable? At what point would the right of publicity collide with the right of free expression guaranteed by the First Amendment?[53]

The following year, the 2nd U.S. Circuit Court of Appeals dealt with the same question on appeal in **Factors, Etc. v. Pro Arts.**[54] In this case, the Court relied upon the 6th Circuit's interpretation, rather than formulate one of its own. More recently, when heirs of the Marx Brothers claimed that the Broadway play "A Day in Hollywood/A Night in the Ukraine"violated their right of publicity by simulating the appearance, style and mannerisms of the Marx Brothers, the 2nd Circuit again denied descendibility of the right.[55]

The dissenting opinion in the 2nd Circuit's **Factors** decision, however, had suggested the 6th Circuit's rejection of descendibility was "inconsistent with nearly every other case which has considered the same." It was that dissent that seemed to impress the Tennessee Chancery Court later in 1981 as it heard the descendents of bluegrass music star Lester Flatt claim that a Coors beer poster using a picture of Flatt infringed on his heirs' right of publicity.[56] The defendants challenged the proposition that the right of publicity survived Flatt's death, but the Chancery Court upheld the right's descendibility:

> The right of publicity should survive after death not only because it is supported by judicial precedent and property interest and fundamental fairness considerations, but also because of public policy. The public policy served by the right of privacy is 'to provide an incentive for enterprise and creativity by allowing individuals to benefit from their personal efforts.' The ability to leave a valuable property interest to one's heirs is further incentive for enterprise and creativity and deserves judicial protection.[57]

Other courts have recognized the right's descendibility for those who have exploited it during their lifetimes by assigning and bequeathing rights to their works. In addition, legislation providing for descendibility has been proposed at both the federal and state level.[58]

While no definitive answer regarding the descendibility of right of publicity exists at this time, other cases have continued to refine the definitions of the right as it relates to the living. Several cases since **Zacchini** have upheld media First Amendment claims over plaintiffs' rights to publicity where literary works were involved or where the medium's purpose was not commercial.

One of the most significant of these, **Hicks v. Casablanca Records,**[59] involved the heirs of Agatha Christie. The heirs challenged a fictionalized book and movie which portrayed the late mystery writer as an emotionally unstable woman who, during an eleven-day disappearance, engaged in a sinister plot to murder her husband's mistress. An earlier case had extended First Amendment protection to factual material used in a biography,[60] but the Christie case, according to a U.S. District Court, raised a novel question: "Whether the right of publicity attaches where the name or likeness is used in connection with a book or movie." The Court said books and movies — more than merchandise — have been considered "vehicles through which ideas and opinions are disseminated and, as such, have enjoyed certain constitutional protections."[61]

Under the circumstances, the Court decided the issue was important enough to warrant looking at judicial interpretations of the right of privacy to determine what limitations, if any, should be placed on right of publicity. Engrafted onto the New York privacy statute, the Court pointed out, were exemptions for matters of news, history, biography and other factual subjects of public interest. "This court finds," the decision said, "that the same privileges and exemptions engrafted upon the privacy statute are engrafted upon the right of publicity."[62]

However, since "Agatha" primarily was conjecture, surmise and fiction — with the exception of a few names and the fact of the eleven-day disappearance — the defendants could not avail themselves of any of the four stated exemptions. The Court thus decided to use a balancing test "between society's interest in the speech and the interest seeking to restrain it."[63]

> The absence or presence of deliberate falsifications or an attempt by a defendant to present the disputed events as true, determines whether the scales in this balancing process shall tip in favor of or against protection of the speech at issue.[64]

Along with rejecting the right of publicity claims in **Hicks**, the Court also rejected the plaintiff's claim of unfair competition. That claim was based on the argument that the use of Mrs. Christie's name in connection with the book and movie would cause confusion by creating the impression the movie

had been authorized or even written by her. The Court said there was no proof such confusion had arisen.[65]

The conclusion was cited by another U.S. District Court just two weeks later in a case in which something akin to the right of publicity was granted in an unfair competition action brought by the director of the movie "Night of the Living Dead" against distributors of "Return of the Living Dead."[66] In this case, the Court determined that the action of the defendants in representing their film as a sequel and in using the same promotional phrases, stylized lettering and photographic scenes as the plaintiff's film constituted false designation of origin and false description of goods or services in commerce. "Confusion has been created," the Court concluded, "which would cause irreparable injury to the plaintiff's reputation and to financial success of his sequel."[67]

Other literary works protected by recent cases include Norman Mailer's **Marilyn**, a work of fiction about the deceased actress Marilyn Monroe,[68] and Jay Anson's **The Amityville Horror**, a book about a modern-day haunted house in which the prologue and epilogue contain paraphrases and quotes taken from two television reporters' on-the-air comments.[69]

In the former case, the Appellate Division of the New York Supreme Court said:

> It is enough that the book is a literary work and not simply a disguised commercial advertisement for the sale of goods or services. The protection of the right of free expression is so important that we should not extend any right of publicity, if such exists, to give rise to a cause of action against the publication of a literary work about a deceased person.[70]

The New York Supreme Court in the second case determined the right of publicity was not applicable where a name or picture was used in connection with the dissemination of news or matters of public interest.[71]

The **Anson** case also is representative of an effort by several courts to limit right of publicity violations to incidents "where the name or picture of a public figure is used without authorization for the purpose of advertising or trade."[72] That purpose was not found in the **Anson** case, nor in a case involving actress Ann Margret, who sued the magazine **High Society** for publishing still photographs taken from one of her movies. She claimed the use of the photographs violated her right of publicity.[73] No such violation was found by a U.S. District Court, which said:

> It is well established that simple use in a magazine that is published and sold for profit does not constitute a use for advertising or trade sufficient to make out an actionable claim.[74]

Such a use for advertising and trade, however, was found in several recent cases involving different forms of media, including magazines and posters. Novelist Jackie Collins Lerman won a right of publicity case in 1981 against Chuckleberry Publishing, which published a magazine containing a nude photo of a woman incorrectly identified as the plaintiff. A U.S. District Court concluded that Ms. Lerman's name was used for commercially exploitative purposes.[75] Similarly, **Forum** and **Penthouse** magazines were found to have violated performer Cher's right of publicity by publishing an interview, which Cher had stipulated could not be published without her consent.[76] Cher's name and likeness were used in ads for the publication. The U.S. District Court said:

> The privilege of using a public figure's picture in connection with an item of news does not extend to commercialization of his (her) personality through a treatment distinct from the dissemination of news or information.[77]

Just as Cher had not consented to publication of her interview, so Christie Brinkley had not consented to publication and distribution of a commercial poster of her likeness. Her right of publicity was violated, the New York Supreme Court said, because she was not receiving any money from poster sales.[78]

In the Brinkley case, the Court concentrated on the right of the individual to reap the reward of her endeavors, and not on "protecting feelings and reputation."[79] But the latter also has been forwarded as a reason for rejecting the claim of newsworthiness in right of publicity cases. Muhammad Ali claimed violation of his right of publicity when **Playgirl** magazine published, without his consent and solely for the purpose of trade, a drawing of a nude boxer identified as "the Greatest" and recognizable as the plaintiff.[80] A U.S. District Court said there was "no informational or newsworthy dimension" to the defendant's use of Ali's likeness. Nor did Ali's status as a public personality preclude liability, the Court said.[81] The Court recognized an added dimension:

> Defendants appear not only to be usurping plaintiff's valuable right of publicity for themselves but may well be inflicting damage upon his marketplace reputation.[82]

Ali, in other words, had the privilege of maintaining for himself and granting to others the right to profit from his name and likeness and of protecting the reputation associated with that name and likeness.[83]

The lack of consent — common to many of the cases cited previously, including those involving Cher, Brinkley and Ali — also was a deciding factor in two more recent court battles. CBS lost a right of publicity case to a private person institutionalized in a state mental hospital primarily because the television network lacked proper consent.[84] In addition to emphasizing CBS' commercial exploitation of its documentary, "Any Place But Here," the New York Supreme Court said that while the patient had signed a consent form, the examining physician, whose signature also was required, had not. Commercial purpose and lack of consent taken together defeated the network's claim to newsworthiness.[85]

SUMMARY AND CONCLUSION

Recent right of publicity cases since **Zacchini v. Scripps-Howard** have seen several elements — descendibility, literary considerations, unfair competition, commercial purpose, harm to reputation and consent — closely intertwined. First, descendibility of the right of publicity has been rejected by some courts, affirmed by others. The latter have said that in order for the right to be descendible, a celebrity must have manifested a recognition of the commercial value of his or her name in an overt manner during his or her lifetime.

Second, a U.S. District Court has determined that in New York the same exemptions to invasion of privacy suits — news, history, biography and other factual subjects of public interest — attach to right of publicity. In the case of fictionalized material, a balancing test between free speech and the interest seeking to restrain it should be used, with the test resting on the presence or absence of deliberate falsification and attempts to represent false material as true.

Third, right of publicity interests have been pursued through actions for unfair competition in cases where there has been false designation of origin and false description of goods or services in commerce.

Finally, the defense of newsworthiness has failed in many instances where courts have found commercial purposes, harm to reputation and/or lack of consent.

Based on these developments, one can conclude that restriction of freedom of expresssion has occurred on occasion and may continue to do so. Right of publicity cases, in the end, do involve a delicate balancing process between the media's right to inform the public about newsworthy people and the celebrity's right to enjoy the fruits of his or her labors.

In light of right of publicity cases since **Zacchini**, the wisest course may be to think less about the Supreme Court's entire-act formula and more about the Court's analogizing of **Zacchini** to copyright law. Copyright's fair-use doctrine, if applied consistently to right of publicity cases, offers a basis on which to strike a balance between the celebrity's interests and that of the public in widespread dissemination of information.[86] Factors to be evaluated under the doctrine include:

- Purpose and character of use of the material. Purely commercial purposes could be taken into consideration here, as well as the intent to disseminate newsworthy information.
- Nature of the material. Here the courts could determine if the material was newsworthy.
- Amount and substantiality of work used. Rather than relying entirely on an entire-act formula, the courts here might determine if essential portions of a performer's act or his personality had been appropriated.
- Effect of work on market for copyrighted material. This consideration would come into play in the determination of damages, based either on injury to the plaintiff or profits reaped unfairly by the defendant. In cases such as Zacchini's — where the balancing question is perhaps most difficult because of the tension between appropriating an entire act but for newsworthy purposes — proof of damages could become the deciding factor.[87]

Consistent use of these guidelines would protect both the interests of the public personalities claiming right of publicity and those of society in general as represented by the media.

FOOTNOTES

1. **Zacchini v. Scripps-Howard**, 97 S.Ct. 2849 (1977).
2. For details of the facts of the case, see the Supreme Court's decision and "Privacy, Appropriation, and the First Amendment: A Human Cannonball's Rather Rough Landing," 1077 **Brigham Young University Law Review** 579 (1977).
3. **Zacchini v. Scripps-Howard**, 2856-7.
4. Edward C. Nucci, "Invasion of Privacy and the First Amendment: Zacchini Makes the Press Pay," 39 **University of Pittsburgh Law Review** 561 (1978).
5. "Privacy, Appropriation, and the First Amendment," 580.
6. Gerald G. Ashdown, "Media Reporting and Privacy Claims: Decline in Constitutional Protection for the Press," 66 **Kentucky Law Journal** 797 (1977-78).
7. Nucci, on page 561 of his article cited above, says the case is "likely to be extended in ways that auger ill for the news media." Warren J. Ludlow talks on "an unworkable standard and a chilling effect on the media" in "Zacchini v. Scripps-Howard Broadcasting Co.: Media Appropriation, the First Amendment and State Regulation," 1977 **Utah Law Review** 828 (1977).
8. "The Right to Privacy," 4 **Harvard Law Review** 193 (1980).
9. "Privacy," 8 **California Law Review** 389 (1960).
10. "Privacy, Appropriation and the First Amendment," 584.
11. **Pavesch v. New England Life Insurance Co.**, 122 Ga. 190, 50 S.E. 68 (1905). The Court rejected a New York decision three years earlier which said that recognition of any such right was the task of the legislature. **Roberson v. Rochester Folding Box Co.**, 171 N.Y. 538, 64 N.E. 442 (1902).
12. "Privacy, Appropriation, and the First Amendment," 608.
13. **Grant v. Esquire**, 367 F. Supp. 876 (S.D.N.Y. 1973).
14. In **Sharman v. C. Schmidt & Sons, Inc.**, 216 F. Supp. 401 (E.D. PSa. 1963), the Court recognized that public figures have a valuable property right in their names and images but denied basketball player plaintiff relief from use of his picture in beer ads.
15. Ludlow, 819.
16. "Privacy, Appropriation, and the First Amendment," 586.
17. **Haelen Laboratories, Inc. v. Topps Chewing Gum, Inc.**, 202 F. 2d 866 (2d Cir. 1953).
18. In **Palmer v. Schonhorn Enterprises, Inc.**, 96 N.J. Sup. Ct. 72, 232 A.2d 458 (1967), the Court granted relief to golfers, saying it was unfair for a game company to commercialize upon their names, reputations and accomplishments. In a more recent case, Guy Lombardo was said to have a cause of action on the basis of appropriation against a car advertisement which used his "reputation" and "mental image or likeness as Mr. New Year's Eve." He was said to have carefully and painstakingly built a public personality which has a marketable status and in which he has a proprietary interest. **Lombardo v. Doyle, Dane & Bernbach** 2 Med. L. Rptr. 2321 (1977).
19. **Price v. Hal Roach Studios, Inc.**, 400 F. Supp. 836 (S.D.N.Y. 1975). A permanent injunction was granted to the same defendants on the same merits without relitigation in **Price v. Worldvision Enterprises** 4 Med. L. Rptr. 1301 (S.D.N.Y. 1978).
20. **Lugosi v. Universal Pictures Co.**, 172 U.S.P.Q. 541, 551 Cal. Sup. Ct. 1972). Reversed 139 Cal. Rptr. 40, 160 Cal. Rptr. 323 (1979).
21. **Fairfield v. American Photocopy Equipment Co.**, 138 Cal. App. 2d 82, 291 P.2d 194 (1955).
22. **Hogan v. A.S. Barnes & Co., Inc.**, 114 U.S.P.Q. 314 (Pa.C.P. 1957)) **Sinatra v. Goodyear Tire & Rubber Co.**, 435 F. 2d 711 (9th Cir. 1970).
23. **Paulsen v. Personality Posters, Inc.**, 69 Misc 2d 444, 299 N.Y.S. 2d 501 (Sup. Ct. 1968).
24. **Man v. Warner Brothers, Inc.**, 317 F. Supp. 40 (S.D.N.Y. 1970).
25. **Current Audio, Inc. v. RCA Corp.**, 337 N.Y.S. 2d 949 (Sup. Ct. 1972).
26. **Booth v. Curtis Publishing Co.**, 1 Med. L. Rptr. 1784 (N.Y.S.C. 1962); **Namath v. Sports Illustrated**, 1 Med. L. Rptr. 1843 (N.Y.S.C. 1975).
27. Charles F. Harris, "Tort Law: Appropriation of a Performer's Act by the News Media — Is It Privileged?" 16 **Washburn Law Journal** 790 (1977).
28. **Zacchini v. Scripps-Howard**, 2849.
29. Ashdown, 792.
30. No. 33, 714 slip op. (Ohio Ct. App., July 10, 1975).
31. Ibid., A33.
32. Ibid., A40.
33. 47 Ohio St. 2d 224, 231. 351 N.E. 2d 454, 459 (1976).
34. 87 S.Ct. 534 (1967).
35. 47 Ohio St. 2d at 232, 351 N.E. 2d at 460. Proving reckless disregard for the truth is, of course, inapplicable to the particular circumstances of this case since it deals with a true presentation of an entire act.
36. Ibid., 235, 351 N.E. 2d at 461.
37. Ibid.
38. 97 S.Ct. 2849, 2856-7.
39. Ibid.
40. Ibid., 2857.

41. Ibid., 2856.
42. Ibid. Ashdown points out, at page 789, that the question of who publicizes information can dictate the extent of distribution, with media having a far greater potential audience.
43. In Footnote #12, the Court explains that if, on the other hand, it could be shown that a broadcast increased the value of a performance through enhancement of reputation, etc., plaintiff could not collect. Ashdown, at page 792, says enhancement of reputation and increased public interest in an act in such cases is much more likely than pecuniary loss and that in this particular case, "any unjust enrichment seems to have fallen on Zacchini."
44. Ibid., 2860. Courts have held that although news is published for profit, it is not considered a "trade purpose." **Donahue v. Warner Bros. Pictures**, 194 F.2d 6, 11-12, 21 (10th Cir. 1952).
45. 97 S.Ct. 2849, 2859.
46. Ibid., 2860.
47. These questions were raised by Ludlow, Ashdown, Nucci and others.
48. One judge referred in 1977 to the "paucity" of decisions in this area **Memphis Development Corp. v. Factors, Etc.**, 3 Med. L. Rptr. 2012, 2013 (W. Dis. Tenn. 1977). But a more recent **Yale Law Journal** article says "courts have been besieged by litigants. . ." Peter Felcher and Edward Rubin, "The Descendibility of the Right of Publicity: Is There Commercial Life After Death," 89 **Yale Law Journal** 1125.
49. **Factors, Etc. v. Creative Card Co.**, 3 Med. L. Rptr. 1290 (S.D.N.Y. 1977), **Memphis Development Foundation v. Factors, Etc.**, 3 Med. L. Rptr. 2012 (W. Dis. Tenn. 1977), and **Factors, Etc. v. Pro Arts, Inc.**, 4 Med. L. Rptr. 1144 (U.S. App. Ct., 2d Cir., 1978).
50. **Factors, Etc. v. Creative Card Co.**, 1293. In **Guglielmi v. Spelling Goldberg Productions**, 2d Civil 49773 (Cal. St. App., 2d App. Dis. 1977), the Court made it clear that the right to exploit name and likeness is personal to an artist and if not exploited by him during his life, his name and likeness may be used by another without liability. The heir of Rudolph Valentino, thus, was left without recourse to claim the actor's right of publicity. The California Supreme Court, upholding this decision, said the respondents' fictional film about the legend of Valentino was similar to commenting on the facts of Zacchini's performance, "which the Supreme Court regarded as entirely permissible." 5 Med. L. Rptr. 2208 (Cal. Sup. Ct. 1979).
51. 5 Med. L. Rptr. 2521 (U.S. App. Ct., 6th Cir., 1980).
52. Ibid., 2523.
53. Ibid., 2522-3.
54. 7 Med. L. Rptr. 1617 (U.S. App. Ct., 2d Cir., 1981).
55. Marx Productions v. Day and Night Co., 7 Med. L. Rptr. 2030 (S.D.N.Y. 1981). Reversed (U.S. App. Ct. 2nd Cir., 1982).
56. **Commerce Union Bank v. Coors**, 7 Med. L. Rptr. 2204 (Tenn. Chan. Ct. 1981).
57. Ibid., 2208.
58. Exploitation was defined in **Hicks v. Casablanca Records**, 4 Med. L. Rptr. 1497 (S.D.N.Y. 1978) as acting in such a way as to evidence recognition of the commercial value of one's name or likeness and manifesting that recognition in some overt manner. See also **Gleason v. Hustler**, 7 Med. L. Rptr. 2183 (N.J. Dis. Ct. 1981) and "A Comment on the Scope and Duration of the 'Right of Publicity,' " Committee on Communications Law of the Association of the Bar of the City of New York, June 30, 1982.
59. 4 Med. L. Rptr. 1497 (S.D.N.Y. 1978).
60. Guglielmi v. Spelling Goldberg Productions, 2d Civil 49773, also extended First Amendment protection to a biography of Rudolph Valentino.
61. **Hicks v. Casablanca Records**, 1499.
62. Ibid.
63. Ibid., 1500.
64. Ibid., 1501. The Court also noted that striking the balance any other way in this case would jeopardize the developing literary genre of fictionalized lives of deceased figures, such as **Burr** by Gore Vidal. Similar questions are raised by television "docu-dramas," such as the one ABC wants to produce on the life of Elizabeth Taylor. Miss Taylor has filed suit, saying she owns her life story and has a right to control her image. See **New York Times** Nov. 21, 1982.
65. Ibid., 1502.
66. **Dawn Associates v. Links**, 4 Med. L. Rptr. 1642 (N. Dis. Ill. 1978).
67. Ibid., Courts have found that unfair competition does not apply if the information in question was obtained from public sources and used only after plaintiff had disseminated it and no longer expected to generate revenue from further dissemination. **NFL v. Governor of Delaware**, 435 F. Supp. 1372 (1977). This case, in which the NFL sought an injunction barring New Jersey from conducting a lottery based on its games, was distinguished from Zacchini because the lottery was not appropriating actual NFL performances but just its schedules, scores and public popularity.
68. **Frosch v. Grossett & Dunlap**, 6 Med. L. Rptr. 1272 (N.Y. Sup. Ct., App. Div., 1980).
69. Bauman v. Anson, 6 Med. L. Rptr. 1487 (N.Y. Sup. Ct. 1980).
70. Frosch v. Grossett & Dunlap, 1272.
71. Bauman v. Anson, 1491.
72. Ibid.
73. **Ann-Margaret v. High Society**, 6 Med. L. Rptr. 1774 (S.D.N.Y. 1980).
74. Ibid., 1777.
75. **Lerman v. Chuckleberry**, 7 Med. L. Rptr. 2282 (S.D.N.Y. 1981).
76. **Cher v. Forum International**, 7 Med. L. Rptr. 2593 (C.D. Cal 1982).
77. Ibid., 2598.
78. **Brinkley v. Casablancas**, 7 Med. L. Rptr. 1457 (N.Y. Sup. Ct., App. Div., 1981).
79. Ibid., 1461.
80. **Ali v. Playgirl**, 3 Med. L. Rptr. 2540 (S.D.N.Y. 1978).
81. Ibid., 2542-3.
82. Ibid., 2544.
83. In a similar vein, the U.S. Court of Appeals, sixth Circuit, ruled in February 1983 that Johnny Carson had an interest in protecting his right of publicity and reputation against a Troy, Michigan, company that markets "Here's Johnny" portable toilets. The Court ruled that the phrase "here's Johnny" was too closely identified with Carson, host of NBC's "The Tonight Show," to allow it to be used without Carson's permission. Carson's argument had been rejected in **Carson v. Here's Johnny**, 6 Med. L. Rptr. 2112 (Mich. Dis. Ct. 1980). See Kansas City Times, Feb. 1, 1983.
84. **Delan v. CBS**, 7 Med. L. Rptr. 2453 (N.Y. Sup. Ct. 1981).
85. Ibid.
86. **Rosemont Enterprises, Inc. v. Random House, Inc.**, 366 F. 2d 303, 306 (2d Cir. 1966), cert. denied, 385 U.S. 1009, 87 S. Ct. 714, 17 L.Ed. 2d. Flecher and Rubin also suggest affirming the descendibility of right of publicity on the basis of copyright law, since copyrights are intended to be inherited and copyright laws recognize the interests of heirs.
87. Zacchini's attorney, John G. Lancione, indicated in a letter dated Sept. 7, 1979, that **Zacchini v. Scripps-Howard** was settled for approximately $13,000.

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